(6)

Supreme Court, U.S.
FILED
MAR 3 2003
CLERK

No. 02-1124

# In The Supreme Court of the United States

JULIANNE M. BOWLER, in her capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

*Petitioner,*

v.

UNITED STATES and JOHN ASHCROFT, in his official Capacity as ATTORNEY GENERAL OF THE UNITED STATES,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

FRANKLIN D. O'LOUGHLIN
*Counsel of Record*
JOEL GLOVER
ROTHGERBER JOHNSON & LYONS LLP
1200 17th Street, Suite 3000
Denver, CO 80202
(303) 623-9000

WILLIAM P. O'SULLIVAN
Senior Vice President & General Counsel
JONI L. FORSYTHE
Senior Counsel
NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS
13873 Park Center Road, Suite 329
Herndon, Virginia 20171
(703) 481-5209

*Counsel for Amicus Curiae National Organization of Life and Health Insurance Guaranty Associations*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pgs

TABLE OF CONTENTS

Page

WRITTEN CONSENT TO FILE *AMICUS CURIAE* BRIEF ..... 1

INTEREST OF THE *AMICUS CURIAE* ..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 5

I. Exempting the United States from the claims filing deadline prevents the use of assets from an insolvent insurer to pay policyholder benefits ..... 5

II. The legal authorities are split as to whether a claims filing deadline in insurer insolvencies applies to the United States ..... 8

III. Exempting the United States from the claims filing deadline impairs the state policyholder protection system ..... 10

A. The Liquidation Act ..... 10

B. The Guaranty Fund Act ..... 12

1. Guaranty funds protect the transfer of risk for the policyholders ..... 13

2. Guaranty funds rely on the insolvent insurer's assets to pay policyholder benefits ..... 15

3. Guaranty funds use the insolvent insurer's assets to provide quick payments and continuing coverage so the policyholders avoid the delays inherent in insurer insolvencies ..... 16

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

Page

CASES

*Boozell v. United States*, 979 F. Supp. 670 (N.D. Ill. 1997) ..... 9

*Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E. 2d 764 (W. Va. 1998) ..... 9

*Davistar Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) ..... 9, 10

*Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) ..... *passim*

*Metro. Life Ins. Co. v. Bd. of Dir. of Wisconsin Ins. Sec. Fund*, 572 F. Supp. 460 (W.D. Wis. 1983) ..... 10

*Munich Am. Reins. Co. v. Crawford*, 141 F. 3d 585 (5th Cir.), *cert. denied*, 525 U.S. 1016 (1998) ..... 9

*North Carolina Life and Accident and Health Ins. Guar. Ass'n v. Alcatel*, 876 F. Supp. 748 (E.D. N.C. 1995) ..... 10

*SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969) ..... 7, 8

*Stephens v. American Intern Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995) ..... 9

*United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993) ..... 3, 7, 8

STATUTES, RULES AND OTHER AUTHORITIES

Christopher J. Wilcox, "The U.S. Guaranty Association Concept at 25," 14 *Journal of Insurance Regulation* 370 (Spring 1996) ..... 12

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. §1012 ..... 4

31 U.S.C. §3713(b) ..... 12

Mass. G.L. c. 175, §146B(8)(K) ..... 14

Mass. G.L. c. 175, §180C ..... 11, 17

Mass. G.L. c. 175, §180F ..... 11

Mass. G.L. c. 175D, §3 and c. 175, §146B(6)(A) ..... 12

Mass. G.L. c. 175D, §5 and c. 175, §146B(4) ..... 13

Mass. G.L. c. 175D, §8 ..... 14

Mass. G.L. c. 175D, §§5 and 1 and c. 175, §§146B(8)(C) and 146B(2) ..... 13

Mass. G.L. c. 175D, §10, c. 175, §§146B(8)(L)(vi) and 146B(6)(B) ..... 12

Mass. G.L. c. 175D, §13 and c. 175, §146B(13) ..... 15

Mass. G.L. c. 175D, §5(1)(c) and c. 175, §146B(9)(E) ..... 15, 16

McCarran Ferguson Act, 15 U.S.C. §1017 ..... 3

Supreme Court Rule 37.2(a) ..... 1

Supreme Court Rule 37.6 ..... 1

## WRITTEN CONSENT TO FILE *AMICUS CURIAE* BRIEF

In accordance with Supreme Court Rule 37.2(a), all parties consented to the filing of this *amicus curiae* brief, in writing. The written consents accompany this brief.

## INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae*, the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"),[1] is a not-for-profit corporation domiciled in Virginia whose members are the life and health insurance guaranty associations of the 50 states, the District of Columbia and Puerto Rico. NOLHGA is the national association representing all of the state life and health insurance guaranty associations. These statutorily created entities provide protection and benefits to policyholders of insolvent life and health insurance companies. A significant source of funding for those policyholder benefits is the policyholders' pro rata share of the remaining assets of the insolvent insurance company. In order to recover those assets, the policyholders and the guaranty associations rely on a claims filing deadline applied to all creditors. Exempting a creditor, in this case the United States, from

[1] This brief was authored in whole by undersigned counsel for NOLHGA. No person, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief. *See* Supreme Court Rule 37.6.

the claims filing deadline, prevents the use of the insolvent insurer's assets to pay policyholder benefits.[2]

NOLHGA was formed to coordinate its member guaranty associations' activities in life and health insurance insolvencies, particularly in complex insolvencies affecting many states. Certain of NOLHGA's member insurance guaranty associations have claims in the American Mutual Liability Insurance Company insolvency, though the claim amounts are small compared to the claims of the property and casualty guaranty funds.[3] Notwithstanding the relative amount of life and health insurance claims in this liquidation, the issue that is the subject of the petition for writ of certiorari is one of paramount importance and enormous, long-term, financial consequences to NOLHGA's member guaranty associations. The decisions below, exempting the United States from a claims filing deadline, threaten a core component of the regulation of the business of insurance – the use of

---

[2] On page 17 of its Petition for Writ of Certiorari, the Petitioner confirmed that, "Receivers thus cannot make distributions to policyholders or other creditors unless they can obtain a waiver from the United States."

[3] There are two different guaranty entities that protect policyholders from insurer insolvencies. Guaranty associations provide coverage to policyholders in life and health insurance insolvencies. The enabling statutes for guaranty associations are based on the National Association of Insurance Commissioners ("NAIC") Model Life and Health Insurance Guaranty Association Act. Guaranty funds provide coverage to policyholders in property and casualty insurance insolvencies. The enabling statutes for property and casualty guaranty funds are based on the NAIC Model Property and Casualty Post-Assessment Guaranty Association Act.

assets of an insolvent insurer to pay policyholder benefits on a priority basis.

NOLHGA appeared and participated as an *amicus curiae* before the United States District Court for the District of Massachusetts and before the United States Circuit Court of Appeals for the First Circuit. Each court rendered a decision that prevents the use of assets from an insolvent insurer to pay policyholder benefits by exempting the United States from the claims filing deadlines for insurer insolvencies. This restriction is a recurring question of national import that will affect every insurer insolvency in the country. It is on this issue that NOLHGA seeks to present argument as an *amicus curiae* before this Court.[4]

## SUMMARY OF THE ARGUMENT

Exempting the United States from a claims filing deadline in insurer insolvencies is a terrible public policy that prevents using estate assets to pay policyholder insurance benefits. Determining whether the claims filing deadline applies to the United States requires an interpretation of "reverse preemption" under the McCarran Ferguson Act, 15 U.S.C. §1017 as applied by this Court in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491

[4] The Alabama Insurance Guaranty Association, et al., also have submitted a Petition for Writ of Certiorari on the same issue based on the same underlying decisions in Case Number 02-1135. NOLHGA also supports the granting of that Petition for the same reasons set forth herein.

(1993).[5] The First Circuit, in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), followed an approach unduly restricting this Court's decision in *Fabe* in determining that the claims filing deadline does not apply to the United States.

The legal authorities from jurisdictions around the country are split as to whether the United States is bound by the claims filing deadline in insurer insolvencies. The First Circuit Court of Appeals has concluded that the claims filing deadline for insurer insolvencies does not apply to the United States. Courts in other jurisdictions have concluded that the United States is subject to the claims filing deadline for insurer insolvencies. Courts of Appeal in other Circuits have rejected the legal reasoning relied on by the court in *Garcia*.

Exempting the United States from a claims filing deadline prevents using assets of an insolvent insurer to pay policyholder benefits. Under the state policyholder protection system, the receiver must pay the assets of the insolvent insurer on a pro rata basis to creditors based on the creditors' priority level. Policyholders and guaranty funds make up the largest priority level of creditors, after administrative expenses, to be paid in insurer insolvencies. Often, they are the only priority level, other than administrative expenses, to receive assets of the insolvent insurer. In order to make the required pro rata payment, the receiver must know the total amount of the claims in

[5] Under the McCarran Ferguson Act, 15 U.S.C. §1012, a federal statute is "reverse preempted" by a state statute where the state statute relates to the business of insurance but the federal statute does not relate to insurance.

the priority level for comparison to the amount of remaining assets. Exempting the United States from the claims filing deadline prevents the receiver from determining the total amount of claims because they are always subject to change. This is particularly true here where the United States maintains that it has policyholder level claims that are not subject to the claims filing deadline. While the receiver is unable to calculate the total amount for claims, the receiver cannot make a distribution of estate assets for the payment of policyholders.

## ARGUMENT

### I. Exempting the United States from the claims filing deadline prevents the use of assets from an insolvent insurer to pay policyholder benefits.

The underlying legal question raised in the petition for writ of certiorari is whether a claims filing deadline in insurer insolvencies applies to the United States. The First Circuit Court of Appeals addressed this issue in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). There, the court decided that the claims filing deadline did not apply to the United States because the claims filing deadline was "neither directed at, nor necessary for, the protection of policyholders. . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." *Id.* at 62.

The district court below concluded that it was "bound" by *Garcia* and held that the claims filing deadline does not apply to the United States. However, in doing so, the court expressed concerns about the underlying basis and

rationale for the *Garcia* decision. The district court concluded that there "is a compelling argument for the proposition that benefits are awarded policyholders by a state filing deadline in liquidation proceedings." App. 40a.[6] Specifically, the court determined that the *Garcia* decision "seems to have been insufficiently sensitive to the fact that late-filed federal policyholder claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general policyholder creditors." *Id.*

In this case, the First Circuit Court of Appeals also determined that it was bound by *Garcia*. App. 15a. Similar to the district court, the First Circuit raised concerns about the underlying rationale for *Garcia*. The court stated that "giving the United States an open-ended exemption from deadlines is (in the liquidation context) simply terrible public policy and was almost certainly not the result of any considered judgment by Congress." App. 16a-17a. In the First Circuit's own words, "Some uniform limit is plainly needed." App. 17a.

The *Garcia* decision did not give full consideration to the effect that a claims filing deadline has on the performance of insurance contracts in an insurer insolvency. It concluded that a filing deadline "is not necessary for liquidation" and it offers only "indirect, speculative" benefits for policyholders. *Id.* at 62. As the district court identified here, the "*Garcia* panel may have understated the disruption which an open-ended opportunity for federal government claims has upon insurance liquidation

[6] Citations are to the Appendix for the Petition for Writ of Certiorari.

proceedings." App. 37a-38a. Without a deadline for claims, "a receiver will not be willing to make a final distribution because the prospect of unanticipated claims would render impossible a final determination." App. 38a. It is the policyholders who will be affected by this delay and the payments for their policy claims that will be withheld. Thus, as the district court stated, "[t]here is a compelling argument for the proposition that benefits are accorded policyholders by a state filing deadline in liquidation proceedings." App. 40a.

This case demonstrates that the policyholder claims of an insolvent insurer will not be paid in the absence of a claims filing date enforced against all creditors, including the United States. The receiver cannot close the insolvency and pay policyholders while the United States refuses to adhere to a claims filing deadline, particularly when the United States may have unasserted policyholder claims. As a result, assets of the insolvent insurer that should be used to provide benefits to policyholders are held up while the United States either cannot or will not identify its claims.

In following *Garcia,* the decisions of the district court and the First Circuit were contrary to this Court's decision in *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 500 (1993). In *Fabe*, this Court held that state legislatures may grant priority to claims for administrative expenses and claims of policyholders over claims of the United States in an insurer liquidation. *Id.* at 508-09. In its ruling, this Court reasserted that, with respect to policies, their "reliability, interpretation, and enforcement . . . were the core of the 'business of insurance.'" *Id.* at 501 (*citing SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969)). With the critical focus on the relationship between

policyholder and insurer, the Court left "no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *Id.* at 503. State statutes "designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy" are laws enacted "for the purpose of regulating the business of insurance." *Id.* at 504.

In *Fabe*, this Court recognized the pragmatic necessity of insolvency administration to protect policyholders. Acknowledging that policyholders would not get paid in the absence of the administration of an insolvent insurer, this Court held that administrative expenses properly could be paid before claims of the federal government. *Fabe*, 508 U.S. at 509. "Without payment of administrative costs, liquidation could not even commence." *Id.* That other creditors might benefit from the payment of administrative costs was irrelevant to the Court. Just as a liquidation cannot be commenced without the payment of administrative costs, a liquidation cannot be concluded without the enforcement of a claims filing deadline. Final payments at the policyholder level cannot be made without absolute certainty as to whether there are unpaid claims of an equal or higher priority. Thus, the United States' unasserted policyholder level claims interfere with and prevent payments to policyholders so long as the United States is not subject to a claims filing deadline.

## II. The legal authorities are split as to whether a claims filing deadline in insurer insolvencies applies to the United States.

Courts from other jurisdictions not bound by the *Garcia* decision have expressed the same concerns as those

raised by the lower courts here and rejected the approach from *Garcia*.

In *Boozell v. United States*, 979 F. Supp. 670, 675 fn. 3, 677-79 (N.D. Ill. 1997), the United States District Court for the District of Illinois rejected *Garcia* and applied a claims filing deadline to the United States because it directly or indirectly assisted policyholders. Similarly, in *Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E. 2d 764, 785-86 (W. Va. 1998), the West Virginia Supreme Court rejected *Garcia* and upheld the subordination of late-filed United States' claims because it protects claims of policyholders.

In addition, other decisions reject the legal analysis developed by the First Circuit in *Garcia* that, to be reverse preempted, a state statute such as the claims filing deadline must be either directed at or necessary for the protection of policyholders. App. 17a. Under *Garcia*, a provision that helps policyholders only to the extent it helps all creditors would not be reverse preempted. *Id.* In direct contravention to that approach, the Second, Fifth and Tenth Circuits each rendered an opinion upholding reverse preemption even where creditors other than policyholders would also benefit from the state statute. *Stephens v. American Intern Ins. Co.*, 66 F.3d 41, 45 (2nd Cir. 1995) (holding that anti-arbitration provision in the state's insurer insolvency liquidation scheme reverse preempted the Federal Arbitration Act); *Munich Am. Reins. Co. v. Crawford*, 141 F. 3d 585, 594 (5th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (statute authorizing injunctions against actions that interfere with insurer receiverships reverse preempted Federal Arbitration Act); *Davistar Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998), *cert. denied,* 525 U.S. 1177 (1999) (upholding a

Utah statute that consolidated all claims against a liquidating insurer in the supervising state court, reverse preempting the Federal Arbitration Act). Contrary to *Garcia*, the Tenth Circuit explained that offering benefits to other creditors neither diminished nor denigrated the ultimate purpose of protecting policyholders. *Davistar*, 152 F. 3d at 1281.

## III. Exempting the United States from the claims filing deadline impairs the state policyholder protection system.

The state policyholder protection system relies on using assets of the insolvent insurer to pay policyholder level creditors. As explained below, exempting the United States from a claims filing deadline prevents those payments and impairs the state policyholder protection system.

The policyholder protection system established by Massachusetts and other state legislatures has two principal and inter-related statutory frameworks – the insurer liquidation act and the relevant guaranty fund laws. These two statutory frameworks operate together to protect policyholders of insolvent insurers and are central elements of each state's regulatory system. *North Carolina Life and Accident and Health Ins. Guar. Ass'n v. Alcatel*, 876 F. Supp. 748, 753 (E.D. N.C. 1995); *Metro. Life Ins. Co. v. Bd. of Dir. of Wisconsin Ins. Sec. Fund*, 572 F. Supp. 460, 470 (W.D. Wis. 1983).

### A. The Liquidation Act.

Upon entry of an Order of Liquidation, the state insurance commissioner is appointed receiver of the

insolvent insurer and charged with liquidating the business of the insurer. Mass. G.L. c. 175, §180C. The rights and liabilities of the insolvent insurer and the policyholders, creditors and others interested in the insolvency become fixed according to law on the date of insolvency. *Id.* Subject to the state liquidation court approval, the receiver is directed to dispose of the insurer's property. *Id.*

The proceeds from the sale of the insolvent insurer's assets are distributed to the insurer's creditors based on a statutory priority scheme. Mass. G.L. c. 175, §180F. The receiver is directed to provide notice to the insurer's creditors of a claims filing deadline – the last date fixed by the state liquidation court by which all claims against the insolvent insurer must be filed. *Id.* The claims are then prioritized into the following general classes:

(1) expenses of administration;

(2) claims of policyholders and guaranty funds;

(3) claims for return of premiums;

(4) claims of the federal government other than those included in class 2 or 3;

(5) compensation of employees for services rendered within three months prior to the commencement of a proceeding;

(6) certain claims for taxes and debts to any state or local government; and

(7) all other claims.

*See Id.*

Thus, the receiver is required to liquidate the insolvent insurer's assets and distribute the proceeds from

those assets to the insolvent insurer's creditors based on the Massachusetts priority statute. The establishment and enforcement of a claims filing deadline is a pragmatic necessity for distributing the insolvent insurer's assets. Before final payment can be made to policyholders and other creditors, the receiver must be able to make a final determination regarding the amount and priority of claims in order to make the appropriate pro rata allocations. If the United States is not subject to a claims filing deadline, then the receiver cannot make a final determination on claim amounts, preventing a pro rata distribution of estate assets to policyholders.[7]

### B. The Guaranty Fund Act.

Guaranty funds are nonprofit legal entities, treated as insurers in certain respects,[8] created by statute and comprised of all insurers licensed in the state. Mass. G.L. c. 175D, §3 and c. 175, §146B(6)(A).

For purposes of the issues raised in this case, there are three critical functions served by guaranty funds in the policyholder protection system. These three critical functions respond to what have been referred to as the "three abiding principles" to protect policyholders in the event of an insurer insolvency. *See* Christopher J. Wilcox, "The U.S. Guaranty Association Concept at 25," 14 *Journal of Insurance Regulation* 370 (Spring 1996). First is the

---

[7] The Receiver faces personal liability for violations of the federal priority statute. 31 U.S.C. §3713(b).

[8] *See e.g.* Mass. G.L. c. 175D, §10, c. 175, §§146B(8)(L)(vi) and 146B(6)(B).

policyholder's loss of risk protection. When an insurer becomes insolvent, policyholders discover that risks they thought had been transferred to an insurer were not transferred at all. *Id.* Second is the insufficiency of funds. In an insolvency, the insurer does not have enough money to pay all policyholder benefits or claims. "Characteristically, in the past the dividends in liquidations have probably averaged less than 50 cents on the dollar." *Id.* Third is the delay in the amount of time it takes for the remaining assets of an insolvent insurer to be applied to the benefit of policyholders. An insurance insolvency could last seven years or even longer. *Id.*

### 1. Guaranty funds protect the transfer of risk for the policyholders.

Subject to certain statutory limitations, the guaranty funds provide coverage for insurance policies and contracts of the insolvent insurer. Mass. G.L. c. 175D, §5 and c. 175, §146B(4). When an insurer is placed into liquidation, the insurer has breached its promise to assume the risks of the policyholder (e.g., risk of injury, property loss or death). The risk transfer that the policyholder paid for and is relying on has failed. At that point, the guaranty fund steps in and assumes the policyholder's risk, paying covered claims or continuing coverage under the policies. Mass. G.L. c. 175D, §§5 and 1 and c. 175, §§146B(8)(C) and 146B(2). Up to the statutory coverage limits, the guaranty fund pays the insurance benefits that the insolvent insurer is no longer able to pay.

The transfer of this coverage and assumption of risk to the guaranty funds does not relieve the insolvent insurer from the consequences of the financial failure. The

company's legal obligations to policyholders continue. The guaranty fund is assigned the claim of the policyholder up to the amount of benefits or coverage the guaranty fund provides. To the extent the policyholder had a claim against the insolvent insurer for a share of that insurer's assets, that claim is assigned to the guaranty fund. Mass. G.L. c. 175D, §8.[9]

Policyholder claims against an insolvent insurer are enormous; debts to policyholders represent the overwhelming majority of claims against an insurer, and the assets are often totally depleted at the policyholder level. Policyholder claims consist of two components. Claims covered by a guaranty fund ("covered claims") are those claims that the state legislatures have determined, in their regulation of the business of insurance, will be paid by guaranty funds. That coverage is funded, in part with assets recovered from the insolvent insurer based on the guaranty funds' statutory assignment rights derived from the policyholders. The balance of guaranty fund coverage costs is generally paid by assessments. Claims not covered by a guaranty fund ("uncovered claims") are those claims that the state legislatures have determined will be paid solely from a policyholder's pro rata share of estate assets and not by the guaranty funds. Thus, it is the policyholder level creditors that will not be paid if the United States is exempt from a claims filing deadline and the receiver is unable to distribute assets of the insolvent insurer.

---

[9] Assignment language also has been enacted with respect to the Massachusetts life and health insurance guaranty association. Mass. G.L. c. 175, §146B(8)(K).

### 2. Guaranty funds rely on the insolvent insurer's assets to pay policyholder benefits.

The guaranty funds pay for policyholder coverage and benefits when an insolvent insurer does not have the money to do so. By means of statutory assignment, one critical source of money for the guaranty funds to provide this benefit is the distribution of assets from the insolvent insurer. The amount of those assets is usually insufficient to cover policyholder claims, and the shortfalls in estate assets are made up almost entirely of assessments imposed by the guaranty fund against its member insurance companies. Mass. G.L. c. 175D, §5(1)(c) and c. 175, §146B(9)(E). Thus, the insurance industry pays to provide the contractual benefits when one of its members fails. The insurance industry is permitted to recoup some of the costs of providing this coverage to policyholders of insolvent insurers by increasing premiums or offsetting a portion of the assessments against premium taxes over a period of time (in Massachusetts, five years). Mass. G.L. c. 175D, §13 and c. 175, §146B(13).

By this mechanism, the Massachusetts Legislature has made an important policy decision regarding the spreading of policyholder risks in an insurer insolvency. The initial brunt of the shortfall in estate assets is borne by the insurance industry. However, many of those costs will ultimately be passed on to insurance consumers in Massachusetts in the form of higher premiums and to the taxpayers in Massachusetts in the form of fewer premium taxes collected from insurers. In order to minimize the impact of assessments, the Massachusetts Legislature has established a limit – a maximum amount that the guaranty fund may assess against its member insurers – equal

to two percent of premiums per year. Mass. G.L. c. 175D, §5(1)(c) and c. 175, §146B(9)(E).

Thus, the amount of money available from assessments to fill the shortfall of an insurer insolvency and pay policyholder benefits is significant, but limited. The more money that is raised by assessments, the greater the impact on the insurance industry and, ultimately, on the insurance consumers and taxpayers of Massachusetts. Conversely, the more that the insolvent insurer's assets can be used to pay policyholders covered by guaranty funds, the less the guaranty funds' need for assessments.

### 3. Guaranty funds use the insolvent insurer's assets to provide quick payments and continuing coverage so the policyholders avoid the delays inherent in insurer insolvencies.

Guaranty funds resolve the delay faced by policyholders in an insurance insolvency by triggering coverage immediately upon the liquidation and substituting themselves for the policyholders in the claims process of the insolvent insurer. Thus, the burden of the delay suffered by the policyholders is transferred to the guaranty funds.

As an additional means of decreasing the delay, and to make certain that the estate assets are available as soon as possible to avoid the unnecessary use of guaranty fund assessment capacity, the Massachusetts Legislature has required that estate assets be distributed to the guaranty funds on an early basis so that those assets can be used to pay policyholder benefits. In the policyholder protection system, these payments are called "Early Access Distributions."

The liquidation statute requires the receiver to make application to the receivership court for a proposal to make Early Access Distributions to the guaranty funds within 120 days of the order of liquidation. Mass. G.L. c. 175, §180C. Such Early Access Distributions may be made only after the receiver has secured sufficient assets to address claims of a higher or equal priority (administrative expenses and policyholders). *Id.* The receiver can only make this reservation of assets if it has a reasonably accurate estimate of the administrative expenses and the policyholder claims. Information associated with these two categories is generally within the possession, if not control, of the receiver. However, if the receiver is subject to claims from the United States at any time, including claims by the United States as a policyholder, the receiver could not make distributions to the policyholder level creditors (including guaranty associations) because it would be impossible to estimate pro rata allocations of assets based on claim amounts.

With the above scheme, Massachusetts has established a legislative balance of interests to finance the policyholder protection system and pay insurance benefits to policyholders. The link between guaranty fund coverage for policyholders and the use of assets of an insolvent insurer to pay those policy benefits is a critical component of that balance. If the United States is exempted from a claims filing deadline, that link will be severed because the assets of the insolvent insurer will not be available for payment to policyholders. After the link has been severed, the amount and timeliness of the benefits that guaranty funds provide to policyholders will be limited, undermining the state's scheme for protecting policyholders. Thus,

the reliability and enforcement of insurance policies will be impaired.

## CONCLUSION

For the reasons stated above, NOLHGA supports the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANKLIN D. O'LOUGHLIN
*Counsel of Record*
JOEL GLOVER
ROTHGERBER JOHNSON & LYONS LLP
1200 17th Street, Suite 3000
Denver, Colorado 80202
(303) 623-9000

WILLIAM P. O'SULLIVAN
Senior Vice President &
General Counsel
JONI L. FORSYTHE
Senior Counsel
NATIONAL ORGANIZATION OF LIFE AND
HEALTH INSURANCE GUARANTY
ASSOCIATIONS
13873 Park Center Road, Suite 329
Herndon, Virginia 20171
(703) 481-5209

*Counsel for Amicus Curiae*
*National Organization of Life*
*and Health Insurance Guaranty*
*Associations*

March 3, 2003